Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1995

WESLEY ANDRESS,

Petitioner,

v.

CLEVELAND INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant *certiorari* to review the United States Court of Appeals for the Fifth Circuit decision to reverse and render upon a district court decision granting a limited medical exception to the eligibility re-evaluation procedures under the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA). Is the Fifth Circuit decision consistent with the statute's stated purpose and legislative history as to the provision of free appropriate public education services designed to meet the individualized and unique needs of disabled students, and consistent with prior decisions of this Court concerning the application of IDEA regulations to unilateral actions of parents of disabled students. Confirmation by this Court that the district court's action as to the medical exception to strict compliance with IDEA regulations was appropriate and within the equitable powers permitted under IDEA and the Court's inherent equitable powers.

LIST OF PARTIES

In addition to the parties listed in the caption, the following parties were defendants-appellees: Central Education Agency for the State of Texas, and Commissioner of Education in his official capacity.

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Petitioner, Wesley Andress, respectfully prays that a *Writ of Certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 28th, 1995, and the subsequent denial of the Motion for Rehearing on September 29th, 1995.

OPINIONS BELOW

The United States District Court for the Eastern District of Texas, Beaumont Division, granted judgment for Petitioner finding that Wesley was denied a free appropriate public education when the public school district insisted on conducting its own comprehensive three-year re-evaluation with school personnel, instead of accepting independent evaluations in the light of the special circumstances of a special education student with existing psychological problems who required protection from unnecessary traumatic experiences threatened by strict compliance to Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. regulations (App. 8-23). On August 28th, 1995 the United States Court of Appeal for the Fifth Circuit reversed that decision and rendered a take-nothing judgment in favor of the school district stating that the district court erred in creating a judicial exception to the IDEA regulations. (App. 1-7). The United States Court of Appeal for the Fifth Circuit denied Petitioner's Motion for Rehearing on September 29th, 1995 (App. 24-25).

JURISDICTION

Judgment of the United States Court of Appeal to the Fifth Circuit was entered on August 20th, 1995, and rehearing denied on September 29th, 1995. This Court's jurisdiction to consider this petition is invoked pursuant to 28 U.S.C. § 1254(1). Original jurisdiction rested pursuant to 20 U.S.C. § 1415(e) and 28 U.S.C. § 1201. This petition is brought in respect of the IDEA claims only, and Petitioner abandons the § 504 of the Rehabilitation Act. 20 U.S.C. § 794 and 42 U.S.C. § 1983 claims as against the Central Education Agency and the Commissioner of Education.

STATEMENT OF THE CASE

In 1982 Wesley Andress was enrolled in Cleveland Independent School District, was evaluated and found eligible for special education services as learning disabled and speech impaired under IDEA. In 1985 he was re-evaluated by the school district and remained eligible as learning disabled under IDEA. In the fall of 1986 Wesley was taunted and severely hazed by his classmates which included physical abuse. After a period of time in 1987 in a psychiatric hospital Wesley's school district services were continued as homebound instruction for the 1987-1988 school year. Wesley's three-year re-evaluation required under IDEA was due by late March 1988. Wesley's parents upon the advice of his psychiatrist would not permit school personnel to evaluate as it was believed Wesley would be further traumatized by such action. The parents obtained independent assessments

which were submitted to the school district who refused to accept such assessments claiming they did not comply fully with the state criteria for evaluations.

Although there was no doubt that Wesley maintained eligibility for special education services, the school district terminated services as no school based re-evaluation had been undertaken. Wesley received no educational services for the 1988-1989 school year and the parents unilaterally placed Wesley in a small private school for the 1989-1990 and 1990-1991 school years.

In December 1989 Wesley's parents requested a special education due process hearing, and in April 1991 the hearing officer held that the school district cannot be compelled to accept independent assessments in lieu of completing its own re-evaluation. In December 1992 Wesley filed suit in federal district court. In March 1994 the district court found for Wesley and reversed the hearing officer. The district court held that there was an exception to the school district right to use its own personnel for re-evaluation where "supervening medical and psychological factors suggest that further evaluations . . . would further damage the student." (App. 19).

The school district appealed the district court decision to the United States Court of Appeal for the Fifth Circuit, who on August 28th, 1995 reversed the district court decision and rendered for the school district stating there were no exceptions to the IDEA regulations on re-evaluations. (App. 7).

REASONS FOR GRANTING THE WRIT

It is respectfully contended that the United States District Court of Appeal for the Fifth Circuit has decided this federal question in a way that conflicts with prior applicable decisions of this court and the stated purpose and intent of IDEA.

In *Florence County School District Four v. Carter,* 114 S.Ct. 361 (1993), this court held unanimously that requiring parental unilateral placement to meet all of the stringent procedural requirements of IDEA would eliminate the right to reimbursement for appropriate unilateral placements (114 S.Ct. 361 at 365 (1993)). The United States Court of Appeal for the Fifth Circuit has applied the rules and procedures of the IDEA regulations in such a manner in this case that the statute no longer acts as a shield to protect disabled students but has been used offensively by a school district as a sword to thwart the statute's intent and purpose to provide individuals of educational services to meet the unique needs of a disabled student. The Court of Appeal in stating there is no exception to the regulations and in denying the very narrow and limited judicial exception created by the district court, places an impossible burden on the parents of disabled students to choose between the health and mental welfare of their children or full compliance with the procedural requirements of IDEA, a statute designed to provide services and to protect the disabled school child. The medical exception set out by the district court is within the equitable powers contained within IDEA and as recognized and confirmed by this Court in *School Comm. of Burlington v. Department of Education of Mass.,* 471 U.S. 359 (1985). Allowance of such a limited exception does not

create any undue burden or cost upon a school district as acceptance by them of continuing eligibility for special education services and appropriate services would remove the need for any unilateral private placement. There is no need for a school district to have the right to an independent evaluation as other than in this limited exception for medical or psychological reasons the school district has the right to evaluate the child with its own personnel. Further, the independent assessments obtained by Petitioner's parents were in substantial compliance with the IDEA regulations and there is no question Petitioner remained eligible and was in need of continuing special education services.

This Court should review this decision and determine whether strict adherence to the IDEA regulations should apply to re-evaluation of a long standing special education student's eligibility in cases when such school based re-evaluation would harm the student. This Court should, in conformity with the prior rulings as to the equitable powers contained within IDEA and application of the statute's procedural regulations to unilateral acts of parents seeking to obtain a free appropriate education for their children, reinstate the district court decision.

CONCLUSION

For all the reasons stated, Petitioner, Wesley Andress, prays that this Court grant a *Writ of Certiorari* to review the decision of the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40669

WESLEY ANDRESS,

Plaintiff-Appellee,
Cross-Appellant,

VERSUS

CLEVELAND INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

CLEVELAND INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant,
Cross-Appellee.

CENTRAL EDUCATION AGENCY AND COMMISSIONER OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas

(Filed Aug. 28, 1995)

Before LAY,[1] DUHÉ and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

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[1] Circuit Judge of the Eighth Circuit, sitting by designation.

This is an appeal by the Cleveland Independent School District ("the school district"), which was forced to pay, under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), for the private schooling of Wesley Andress, a special education student. Wesley's parents refused to allow the school district to reevaluate him, using its own personnel, in order to determine his continuing eligibility for special education, as his parents feared such reevaluation would harm him. We hold that there is no exception to the rule that a school district has the right to reevaluate a student using its own personnel and we REVERSE the judgment of the district court and RENDER a take-nothing judgment in favor of the school district.

Wesley also sued the school district and the Texas Central Education Agency ("TEA") under § 504 of the Rehabilitation Act of 1973 (codified at 29 U.S.C. 794) and 42 U.S.C. § 1983, because the hearing officer did not issue his decision within 45 days from the end of the evidentiary hearing. The district court dismissed both claims against both the school district and the TEA. We find that Wesley waived any right to a decision within 45 days and AFFIRM the decision of the district court.

BACKGROUND

Wesley Andress, now a twenty-four year old man, was enrolled in the Cleveland Independent School District from 1982 to 1988. In 1982, the school district evaluated Wesley and classified him as learning disabled and speech impaired special education student under IDEA.

In 1985, the school district reevaluated Wesley and determined that while he was no longer speech impaired, he remained learning disabled under IDEA.

During the fall of 1986, Wesley was taunted and hazed by his classmates. Eventually, the taunting turned to physical violence, and, once, fellow students attempted "to poke a tennis racket up his rear". As a result of this abuse, Wesley was admitted to a psychiatric hospital in the spring of 1987.

After Wesley's release from the psychiatric hospital, he was placed, at the request of his psychiatrist, Dr. Barbara Hibner, on homebound instruction for the 1987-88 school year. Wesley's three-year comprehensive reevaluation to establish his continuing eligibility for special education services ("reevaluation") was due by late-March 1988. Wesley's parents were aware that a reevaluation was needed, however, based on their understanding of Dr. Hibner's advice that Wesley would be traumatized by additional testing, they refused to allow the school district to test Wesley. Instead, Wesley's parents obtained independent assessments. The school district rejected the assessments, as they did not comply with Texas State Board of Education criteria.

Wesley did not attend school during the 1988-89 school year. In the 1989-90 school year, Wesley's parents unilaterally placed him in Memorial Hall, a small private school, where he remained through the 1990-91 school year.

In December 1989, Wesley's parents requested a special education due process hearing, and in April 1991, the hearing officer rendered a decision. The hearing officer

held that the school district cannot be compelled to accept independent assessments in lieu of completing its own reevaluation. Wesley's parents filed suit in federal district court in December 1992, seeking to overturn the hearing officer's decision. In March 1994, the district court found for Wesley and reversed the hearing officer. The district court held that, while school districts have the right to use their own personnel to reevaluate students, there is an exception where "supervening medical and psychological factors suggest that further evaluations . . . would further damage the student".

The district court awarded Wesley damages of $20,870 and attorney's fees of $28,187.50. The school district filed a timely notice of appeal.

SCHOOL DISTRICT'S RIGHT TO REEVALUATE WESLEY

Congress passed IDEA in an effort to ensure that "all handicapped children have available to them . . . a free appropriate education which emphasizes special education and related services designed to meet their unique needs". 20 U.S.C. § 1400(c). In order to receive the special education mandated by IDEA, a child must first be identified as "handicapped" or "disabled". Once a child has been identified as handicapped, he must be reevaluated at least every three years, to determine his continuing eligibility for special education. 34 C.F.R. § 300.534.

If a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation. *Gregory K. v.*

Longview School Dist., 811 F.2d 1307, 1315 (9th Cir. 1987) ("If the parents want [the student] to receive special education under the Act, they are obliged to permit such testing."); *DuBois v. Conn. State Bd. of Ed.*, 727 F.2d 44, 48 (2d Cir. 1984) ("[T]he school system may insist on evaluation by qualified professionals who are satisfactory to the school officials."); *Vander Malle v. Ambach*, 673 F.2d 49, 53 (2d Cir. 1983) (School officials are "entitled to have [the student] examined by a qualified psychiatrist of their choosing."). A parent who disagrees with the school's evaluation has the right to have the child evaluated by an independent evaluator, possibly at public expense, and the evaluation must be considered by the school district. 34 C.F.R. § 300.503.

It would be incongruous under the statute to recognize that the parents have a reciprocal right to an independent evaluation, but the school does not. Furthermore, the school, under the existing facts, had every right to insist on an independent evaluation because the parents' evaluations did not comply with the Texas State Board of Education criteria.

The district court in the instant case recognized that school districts have the right to use their own personnel to reevaluate students. However, the district court said that there was an exception to this rule when further testing by school officials would harm the child medically and psychologically. The district court found that the exception was met here and the school district did not have a right to reevaluate Wesley.

The district court erred in creating this judicial exception to the rule. The district court cited no law in support

of its position. Nothing in the statutes, regulations or caselaw supports such an exception.[2] Therefore, we hold that there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA.

WESLEY'S § 504 AND § 1983 CLAIMS

Wesley sued the school district and the TEA under § 504 of the Rehabilitation Act of 1973 (codified at 29 U.S.C. 794) and 42 U.S.C. § 1983, because the hearing officer did not issue his decision within 45 days from the end of the evidentiary hearing. The evidentiary hearing ended on January 25, 1991 and the hearing officer issued his decision on April 10, 1991, 74 days later. After the close of evidence in the trial, the district court dismissed the § 504 and § 1983 claims against both the school district and the TEA and Wesley appeals.

Wesley requested four continuances of the due process hearing and did not oppose many of the school district's request for continuances. Wesley's attorney sent a letter to the hearing officer indicating he was waiving the 45-day requirement. Therefore, as Wesley waived any right to a decision within 45 days, the district court did

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[2] The only case we found concerning any such exception was *Doe v. Phillips*, 20 I.D.E.L.R. 1150 (N.D. Cal. 1994), where the district court held that there was no medical exception to the school district's right to reevaluate a student using its own personnel.

not err in dismissing his § 504 and § 1983 claims, and that decision of the district court is affirmed.[3]

CONCLUSION

A handicapped student must be reevaluated every three years to determine his continuing eligibility for special education under IDEA. A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its own personnel; there is no exception to this rule. Wesley's parents refused to allow the school district to reevaluate him. Therefore, Wesley was not eligible for special education after March 1988, when his reevaluation was due.

Because Wesley was not eligible for special education after March 1988, the school district does not owe Wesley or his parents any money to reimburse them for the cost of providing Wesley with special education. Accordingly, the judgment of the district court in favor of Wesley is REVERSED and judgment is RENDERED in favor of defendant-appellant Cleveland Independent School District that plaintiff-appellee Wesley Andress take nothing. The judgment of the district court dismissing Wesley's § 504 and § 1983 claims is AFFIRMED.

REVERSED AND RENDERED IN PART AND AFFIRMED IN PART.

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[3] There is some question as to whether § 504 requires hearing officers to render decisions within 45 days. However, because Wesley waived any right to a decision within 45 days, we need not reach that issue.

EOD MAR 14 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

WESLEY ANDRESS	*	
	*	CIVIL ACTION
VS.	*	NO. 1:92CV510
CLEVELAND INDEPENDENT	*	
SCHOOL DISTRICT; THE CENTRAL	*	
EDUCATION AGENCY AND THE	*	
COMMISSIONER OF EDUCATION	*	
IN HIS OFFICIAL CAPACITY	*	
	*	

MEMORANDUM AND ORDER

(Filed Mar. 11, 1994)

This case involves an action under the Individuals with Disabilities Education Act, hereafter "IDEA," (formerly the Education of the Handicapped Act, EHA), 20 U.S.C. Section 1400 et seq., seeking to establish Petitioner Wesley Andress' continued eligibility for special education services after March 25, 1988, through an independent educational evaluation obtained by his parents. Respondent Cleveland Independent School District, hereafter CISD, contends that it is not legally obligated to accept an independent educational evaluation obtained by Wesley's parents for such purposes and that it is entitled to perform its own comprehensive educational evaluation of Wesley to establish his eligibility for special education services. Moreover, CISD contends that the independent educational evaluation obtained by Wesley failed to comply with IDEA requirements and therefore is

inappropriate for purposes of establishing Wesley's eligibility for special education services.

A hearing before the Special Education Hearing Officer for the State of Texas was held on December 12, 1990 and January 25, 1991. In an opinion dated April 10, 1991, the hearing officer concluded that CISD was required by the EHA, now the IDEA, to reevaluate Wesley on or before March 25, 1988 and that Wesley's refusal to be evaluated prohibited him from claiming that he was denied a free appropriate public education. 20 U.S.C. Section 1412(5)(c), 34 C.F.R. Reg. 300.503(c) and 300.534.

This case is now before the Court on appeal from the decision of the hearing officer. Such appeal is under the auspices of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. Section 1400 et. seq.

The standard of review for an appeal of a special education administrative decision is a de novo review. "[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. Section 1415(e)(2). *Teague ISD v. Todd L.*, 999 F.2d 127 (5th Cir. 1993).

The issue on appeal is whether Wesley Andress was eligible for special education services under the IDEA. This Court is of the opinion that special circumstances sometimes warrant a waiver from strict compliance to the IDEA. For the reasons set forth below, we reverse the decision of the Special Education Hearing Officer and find that such circumstances exist and that Petitioner was

at all times eligible for special education services but was denied a free appropriate public education.

I. STATEMENT OF FACTS

Petitioner, Wesley Andress, was born on November 23, 1970, at the time of the administrative hearing he was a twenty year-old male who resided with his parents within the jurisdictional boundaries of the CISD. Respondent, CISD, is a political subdivision of the State of Texas and a legally constituted independent school district within Liberty County, Texas.

Prior to 1988, Wesley received special education services throughout his educational career. Wesley's eligibility for special education continued based on the results of comprehensive educational evaluations establishing that he was learning disabled, speech impaired, and other health impaired. CISD completed its last comprehensive educational evaluation of Wesley on March 25, 1985.

During the course of the fall semester of the 1986 school year, Wesley was subjected to considerable hazing by his peers culminating in acts which constituted considerable physical abuse. As a result of the abuse, Wesley was admitted to a psychiatric hospital on April 23, 1987.

While hospitalized, Wesley received a psycho-educational evaluation which was completed by Natalie Murray, Ed.D. The intellectual portion of the evaluation reflected that Wesley achieved a verbal scale I.Q. score of 120, a performance scale I.Q. score of 75, and a full scale

I.Q. score of 99. These scores indicated that Wesley functioned in the normal range of intellectual potential. However, a significant 45 point discrepancy existed between Wesley's verbal and performance I.Q. scores. Based on additional testing, the evaluator concluded that Wesley suffered from a sensory processing dysfunction in the areas of visual-motor integration, visual-motor spatial and auditory comprehension.

Also during this hospitalization, Wesley underwent a complete neurological, and psychological evaluation. Dr. Barbara Hibner, a child psychiatrist, conducted these evaluations which indicated that Wesley suffered from a non-verbal learning disability known as developmental arithmetic disorder or developmental Gerstmann Syndrome.

Persons afflicted with Gerstmann Syndrome have pronounced problems with social competency and are often viewed as psychologically disturbed or maladjusted when, in fact, many of their difficulties stem from inadequate social and organizational skills. Those diagnosed with the syndrome normally have a high risk of developing internalized psychopathology.

Dr. Hibner determined that Wesley's cognitive disabilities interfered with his interpersonal functioning and would lead to significant internal psychopathology if not counteracted. In her opinion, Wesley's level of anxiety reached panic proportions incapacitating him for learning whenever he was subjected to any type of forced interpersonal interaction. She further opined that his traumatic experience with peers in the school environment was the cause of his progressive social disability. In light of

these findings, Dr. Hibner determined that it would be medically unwise for Wesley to return to a regular school environment and thus, recommended that CISD provide Wesley with homebound instruction.

A meeting was held on the 13th day of August, 1987, at the Laurelwood Hospital and was attended by Dr. Hibner, Natalie Murray, Mrs. Andress and Mr. Garret, the special education director for the Liberty County Co-Op. At that meeting Dr. Hibner discussed Wesley's fear of school and all things associated with school. The result of the meeting was an agreement that services for Wesley would be coordinated through Dr. Hibner.

An Admission, Review and Dismissal committee meeting was convened on that same day, August 13, 1987, to discuss Dr. Hibner's evaluation and recommendation and to develop an educational program for Wesley for the 1987-1988 school year. Wesley was declared eligible for services as "other health impaired." Consequently, the ARD committee agreed to provide Wesley with homebound academic instruction for two hours per day, five days a week. In addition, the ARD committee agreed that Wesley would work twenty hours per week for compensation; receive remedial educational services from Natalie Murray, Ed.D., for four hours per week, swim 30-90 minutes three times per week, receive physical therapy three times per week, develop computer skills, and utilize an academic program for arithmetic.

During the course of Wesley's homebound instruction, CISD requested access to Wesley for purposes of a comprehensive three year re-evaluation. Mrs. Andress, relying upon Dr. Hibner's evaluations of Wesley, refused

such access. However, in order to attempt to work with CISD, Mrs. Andress did make Wesley available for a physical therapy evaluation which found him in need of such services. Further, Wesley was given achievement testing by the homebound teacher.

In order to provide proof of eligibility and to provide information to the ARD committee Wesley's parents undertook at their own expense additional independent evaluations by Dr. Lendell Braud, a licensed psychologist.

The independent educational evaluation completed by Dr. Braud failed to comply with the criteria set forth by the State Board of Education for *comprehensive* individual assessments. Dr. Braud's evaluation failed to adequately assess the areas of language dominance, language, physical, emotional/behavior, sociological, and learning competencies. When these discrepancies were brought to light, Dr. Braud performed additional testing and modified her independent educational evaluation.

Dr. Braud's modified evaluation did include an intellectual assessment which indicated that Wesley's overall I.Q. score of 107 was in the normal range. This assessment also identified a 31 point discrepancy between Wesley's verbal scale I.Q. score of 120 and his performance scale I.Q. score of 89. Based on the results of her evaluation, Dr. Braud recommended that CISD provide Wesley with a year-round intensified educational remediation program in a small class setting. Dr. Braud opined that returning Wesley to a CISD campus would produce extreme levels of anxiety while confinement to homebound instruction would result in serious social skill deficiencies. Accordingly, Dr. Braud recommended that

the ARD committee consider placing Wesley in a therapeutic educational program outside the public school system.

Thereafter, Mrs. Andress requested that CISD publicly fund a complete language and auditory assessment of Wesley to be conducted by an independent evaluator of her choice. Upon CISD's refusal to fund such an evaluation, Wesley's parents obtained an independent evaluation of Wesley by Judith Arceneaux, a speech and language pathologist. The evaluation by Ms. Arceneaux found that Wesley exhibited moderate to severe communication difficulties for a student his age. Specific areas of difficulty included vocabulary, linguistic and semantic comprehension short-term auditory memory for multilevel oral directives; inferential thinking; comprehension of metaphoric expressions; grammar and syntax; and functional language skills. The speech pathologist found Wesley to be eligible for special education services as a speech handicapped student based on a 29 point differential between Wesley's full scale I.Q. score of 107 and his total language score of 78 taken from the Clinical Evaluation of Language Fundamentals-Revised. She also recommended that he receive individual and group speech therapy services three to four times per week in order to improve his social communication skills.

All of the independent evaluations obtained by the Andresses were reviewed by the ARD committee and certain discrepancies with the criteria of the State Board of Education's rules for three-year re-evaluations were raised. CISD, insisting upon its own evaluations, terminated Wesley's eligibility for special education services beginning with the 1988-1989 school year. Thereafter, in

the summer of 1989, his parents unilaterally placed him in a private school at their own expense.

Memorial Hall, the private school in which Wesley was enrolled, provided Wesley with the small group, therapeutic program recommended by Drs. Hibner and Braud, as well as providing him with speech therapy. While at Memorial Hall, Wesley was able to progress socially and received an educational benefit from the program; a benefit that Wesley was unable to obtain from CISD.

II. DISCUSSION

The issue presented is whether Wesley's parents' refusal to allow CISD the opportunity to conduct its own three-year comprehensive educational re-evaluation of Wesley precluded Wesley from being eligible for special education services.

In addressing this issue, it must be recognized that Wesley's parents obtained individual evaluations of Wesley which substantially complied with the IDEA requirements. Furthermore, Wesley's parents refused CISD's re-evaluation request on the advise of independent evaluators and the fear that Wesley's socio-behavioral problems would escalate if he was returned to CISD and further evaluated.

In this respect, it is the purpose of the Individuals with Disabilities Education Act (IDEA) to assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their

unique needs; to assure that the rights of children with disabilities and their parents or guardians are protected; to assist States and localities to provide for the education of all children with disabilities; and to assess and assure the effectiveness of efforts to educate children with disabilities. 20 U.S.C. Section 1400(c).

Part of the procedures to protect special education students requires that a comprehensive re-evaluation be administered at least every three years. However, it is not mandated that the actual evaluation be undertaken by school district personnel.

C.F.R. Regulation 300.532 requires that validated tests be utilized, and that trained people undertake the testing. But the only requirement specific to the school district is the requirement that the public agency "ensure" that the evaluation takes place and that a teacher or other specialist with knowledge in the area of the suspected disability be part of the group making the decisions. Furthermore, the federal regulation governing independent educational evaluations guarantees parents of a handicapped child the right to obtain an independent educational evaluation and requires that school districts consider any independent educational evaluation obtained by parents in any decision made with respect to the provision of a free appropriate education. C.F.R. Reg. 300.503.

The independent evaluations conducted by Dr. Braud, Dr. Hibner, and Ms. Murray did not violate Regulation 300.532. Valid tests were utilized, the persons administering those tests were trained to conduct such testing, and Wesley's homebound instructor during the

1987-1988 school year was available to assist the Admission, Review, and Dismissal Committee in its decision-making.

There is no regulatory requirement that an ARD committee accept a parent-obtained independent educational evaluation in lieu of conducting its own evaluation. Under the applicable federal regulations, school districts always have the option of using their own personnel to complete a re-evaluation of a handicapped student for purposes of addressing the continued eligibility of that student for special education services. However, when supervening medical and psychological factors suggest that further evaluations and forced attendance within the CISD would further damage the student, independent evaluations should be accepted.

Wesley had been eligible for special education services since he was in kindergarten at Splendora Independent School District, CISD evaluated and found him "eligible" in 1982 and 1985, he continued to have socio-behavioral problems up to March 25, 1988, he was found eligible for special education by independent evaluators in the period from 1987-1989, and it was suggested to Wesley's parents that they refuse any further evaluations of Wesley for the sake of protecting him from psychological and medical injury. In light of these factors, the CISD should have accepted the independent evaluations. Although the independent evaluations were not in strict compliance with IDEA, the interests of the handicapped student, in this case, outweigh the school district's decision to hide behind mechanical guidelines.

III. CONCLUSION

It is the opinion of this Court that Wesley was, at all times, eligible for special education services and that CISD's termination of Wesley's eligibility for those services effectively denied him of a free appropriate education. Accordingly, the decision of the Special Education Hearing Officer is hereby reversed and judgment is entered in favor of Petitioner.

In reaching this reversal of the Special Education Hearing Officer, the Court remains cognizant of the amount of deference that should be given to his decision. As stated in *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, ___ L.Ed. ___ (1982):

> " . . . the provision that a reviewing court base its decision on the 'preponderance of evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. . . . The fact that Section 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings, carries with it the implied requirement that due weight shall be given to these proceedings. . . . In short, the statutory authorization to grant 'such relief as the court determines is appropriate' cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress."

In reversing the hearing officer's decision and finding that Wesley was denied a "free appropriate education," this Court is not implementing an educational

ideology nor is it disregarding the local educational agency's adherence to the IDEA. It is the opinion of the Court that children with special educational needs, whose existing psychological problems are threatened by strict compliance to IDEA regulations, should be protected from unnecessary traumatic experiences and that, in light of the special circumstances of this case, CISD should have accepted the individual evaluations and recommendations instead of insisting on a "comprehensive" three year re-evaluation which was to be conducted by school personnel.

Finally, it is the opinion of the Court that Wesley Andress is entitled to whatever relief this Court deems appropriate. 20 U.S.C. Sections 1415(e)(2) and *Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 385 (1985). The appropriate relief to be recovered will be determined by a Court ordered hearing on the issue.

SIGNED and ENTERED this 11 day of March, 1994.

/s/ Hon. Joe J. Fisher
UNITED STATES
DISTRICT JUDGE

EOD 6/3/94

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

WESLEY ANDRESS	*	
	*	CIVIL ACTION
VS.	*	No. 1:92CV510
	*	
CLEVELAND INDEPENDENT	*	
SCHOOL DISTRICT; THE CENTRAL	*	
EDUCATION AGENCY AND THE	*	
COMMISSIONER OF EDUCATION	*	
IN HIS OFFICIAL CAPACITY	*	
	*	

FINAL JUDGMENT

(Filed Jun. 1, 1994)

On March 11, 1994, this Court entered a Memorandum and Order finding that Plaintiff was "denied a free appropriate education" and is to recover "whatever relief this Court deems appropriate." Citing, 20 U.S.C. Sections 1415(e)(2). In furtherance of the Order, this Court, on April 22, 1994, held an evidentiary hearing in order to determine the "appropriate relief" to be awarded.

Pursuant to the Memorandum and Order, and following the evidentiary hearing and a review of the briefs in support of the parties' positions, and according to *Burlington School Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359, this Court finds the following relief "appropriate"[1]:

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[1] The reimbursement of costs and expenses found to be appropriate relief are those incurred between August, 1986 and June, 1991.

(1) reimbursement for private school costs and related expenses to the extent of $18,298.00; this amount consisting of $8,988.00 in tuition, $872.00 in therapy costs, and $8,438.00 in travel expenses[2];

(2) reimbursement for evaluation expenses and counselling amounting to $3,433.00; and

(3) attorney's fees amounting to $28,187.50, this being based on an amount of time this Court finds to be reasonable, 225.50 hours, multiplied by the reasonable hourly rate of $125.00.

It is therefore ORDERED that, pursuant to this Court's Memorandum and Order of March 11, 1994, Plaintiff hereby recovers $21,731.00 in reimbursement of costs and expenses and $28,187.50 in attorney's fees.

SIGNED this 1st day of June, 1994.

/s/ Hon. Joe J. Fisher
UNITED STATES
DISTRICT COURT

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[2] This Court does not find any question that Memorial Hall provided Plaintiff with the individualized attention and educational services necessary to have been a "proper placement" under the IDEA. *Florence County School Dist. Four v. Carter* ___ U.S. ___, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

EOD 6/14/94

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

WESLEY ANDRESS	*	
	*	CIVIL ACTION
VS.	*	NO. 1:92CV510
	*	
CLEVELAND INDEPENDENT	*	
SCHOOL DISTRICT; THE CENTRAL	*	
EDUCATION AGENCY AND THE	*	
COMMISSIONER OF EDUCATION	*	
IN HIS OFFICIAL CAPACITY	*	
	*	

AMENDED FINAL JUDGMENT

(Filed Jun. 14, 1994)

On March 11, 1994, this Court entered a Memorandum and Order finding that Plaintiff was "denied a free appropriate education" and is to recover "whatever relief this Court deems appropriate." Citing, 20 U.S.C. Sections 1415(e)(2). Thereafter, on June 3, 1994, final judgment was entered.

This Court, having been made aware of an error in calculation in the Final Judgment, amends the Final Judgment by reducing Plaintiff's recovery of reimbursement of costs and expenses from $21,731.00 to $20,859.00. In doing so, this Court corrects the miscalculation found in the reimbursement of private school costs and related expenses. The correct amount of recovery for these costs and expenses are $17,426.00; this amount consists of $8,448.00 in tuition, $540.00 in therapy costs, and $8,438.00 in travel expenses.

It is therefore ORDERED that the Court's Final Judgment of June 3, 1994, is hereby amended to correct Plaintiff's reimbursement of costs and expenses. However, the Final Judgment shall remain in effect as to all unaffected portions.

SIGNED this 14 day of June, 1994.

/s/ Hon. Joe J. Fisher
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40669

WESLEY ANDRESS,

Plaintiff-Appellee,
Cross-Appellant,

versus

CLEVELAND INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

CLEVELAND INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant,
Cross-Appellee,

CENTRAL EDUCATION AGENCY AND COMMISSIONER OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

(Filed Sept. 29, 1995)

Before LAY[1] DUHÉ, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR
THE COURT:

/s/ Harold R. DeMoss
United States
Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

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[1] Circuit Judge for the Eighth Circuit, sitting by designation.